

LAW OFFICES OF ROBERT C. HAWKINS

January 17, 2013

Via Facsimile Only

Michael L. Toerge, Chair
Members of the Planning Commission
c/o James E. Campbell, Principal Planner
Department of Community Development
City of Newport Beach
3300 Newport Blvd.
Newport Beach, California 92663

Re: **Further Comments on the Final Mitigated Negative Declaration ("FMND") for the City Hall Reuse Project (the "Project").**

Greetings:

Thank you for the opportunity to comment on the captioned matter. This firm represents Friends of Dolores, a community action group dedicated to ensuring compliance with state and local laws including the California Environmental Quality Act, Public Resources Code sections 21000 et seq., Friends of City Hall, a community action group dedicated the preservation of the "City Hall" site for civic purposes, and others in the City in connection with the captioned matter.

We have commented on the captioned DMND and offer these comments on the captioned document.

First, please note that, in our December 26, 2012 letter on the captioned Project and MND, we requested notices in connection with the captioned matter. Also, because we commented on the Project and the DMND, state law requires that the City provide us with a copy of the response to, at least, our comments. The City has done none of this: we did not receive any notice of this hearing; and we did not received a copy of the response to our comments. Because of this lack of notice, we are not prepared this hearing and request a continuance of two weeks so that we can submit full and complete comments on the FMND. We offer these partial comments and will prepare full comments for the continued hearing.

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Second, the FMND states that "Mr. Robert C. Hawkins" submitted comments on the DMND. That is incorrect. As indicated in Letter No. 3, this office represents several community groups also listed above. I am not making these comments personally. I am required to state the clients and have complied.

Third, we appreciate that the City decided to print the responses to comments in non-italicized font. As is obvious, it is much easier to read. Response to Comment No. 1 recognizes that the DMND was circulated in a non-"normal" font, italics. Because of this, the DMND should be recirculated for public review and comment in this normal font so that the public can easily and fully review the DMND. The italicized DMND is the same as printing it in hieroglyphics or some other foreign language: it failed to perform its required informational purpose under CEQA. Because of this, the City must reformat the DMND and recirculate it for public review and comments.

Fourth, many of the responses to our comments noted that the Project is a programmatic one which includes a General Plan Amendment, Zone Change, and an amendment to the Local Coastal Land Use Plan. However, given that the City has undertaken environmental review at this point, the analysis must include an analysis of impacts under the reasonable worst case scenario. Planning & Conservation League v. Castaic Lake Water Agency (2009) 180 Cal. App. 4th 210, 252. That is, when the Project would allow a sixty foot building, then the environmental analysis must include discussion of the shade impacts of the Project and other impacts under the "reasonable worst case scenario."

Further, as indicated in our comments on the DMND, the FMND is simply attempting to defer analysis of the Project's impacts and mitigation. Deferral of environmental analysis violates CEQA. For instance,

"By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process."

Sundstrom v. County of Mendocino (1988) 202 Cal. App. 3d 296, 308. See Bozung v. Local Agency Formation Com. (1975) 13 Cal.3d 263, 282 (holding that "the principle that the environmental impact should be assessed as early as possible in government planning."); Mount Sutro Defense Committee v. Regents of University of California (1978) 77 Cal. App. 3d 20, 34 (noting that environmental problems should be considered at a point in the planning process "where genuine flexibility remains"). CEQA requires more than a promise of analysis and mitigation of significant impacts: it requires actual analysis and mitigation measures that really minimize an identified impact.

Further, the City cannot defer mitigation:

"Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. (Citation omitted.) On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. (Citation omitted.)"

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Defend the Bay v. City of Irvine (2004) 119 Cal. App. 4th 1261, 1276.

The FMND attempts improperly to defer both environmental analysis and mitigation. The City cannot simply propose vague and programmatic measures now and then promise further analysis. We have seen similar promises broken again and again.

More importantly, both the General Plan and the Local Coastal Land Use Plan include height restrictions and policies to limit heights. The FMND fails to analyze the Project's impacts on these restrictions and policies. For instance, Land Use Element Policy LU 5.1.2 which concerns "Compatible Interfaces" states:

"Require that the height of development in nonresidential and higher density residential areas transition as it nears lower density residential areas to minimize conflicts at the interface between the different types of development."

The Project conflicts with this Policy and the FMND fails to explain the impact and provide adequate mitigation.

Likewise, the Local Coastal Land Use Plan Policy No. 2.7-1 requires:

"Continue to maintain appropriate setbacks and density, floor area, and height limits for residential development to protect the character of established neighborhoods and to protect coastal access and coastal resources."

The Project fails to maintain height limits and will have the potential to create significant impacts on land use, aesthetics, air quality and others by inserting this sixty foot structure in an area of low rise commercial and residential structures.

Fifth, as to the shade analysis, Response to Comment No. 22 fails to provide any rationale for failing to include a shade analysis. Comment No. 22 notes that the DMND fails to include the necessary shade analysis to determine fully the aesthetic impacts on the Project with its sixty foot structure. The Response states that:

"The City Hall project site is located in a mixed use area where the predominant land uses in the immediate vicinity do not include residential uses. As a result, a shade/shadow study was not conducted."

FMND, Responses to Comments, page 12(sic). This is incorrect. Residential uses surround the Project site: across 32d Street, there is a mixed use residential development; across the channel, Newport Island residents would be affected; outdoor restaurants in the vicinity would be affected including those across Newport Blvd. and those in Via Lido shopping center. Further, the DMND states in Section 2.1 that one of the reasons that the Project is compatible with the area is that the City anticipates receipt of application for multifamily uses in the vicinity.

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Moreover, the FMND is incorrect that shade analysis is only necessary for residential uses. However, the City has Policy K-3 which is entitled "Implementation Procedures for the California Environmental Quality Act." K-3 contains no such restriction that shade impacts shall only be considered when a project is in the immediate vicinity of residential uses.

Indeed, the Draft EIR for the Wilshire Grand Redevelopment Project included a shade analysis due to shadow sensitive uses which include residential uses but also include recreational uses, outdoor restaurants, and other uses where shadows create impacts.

Here, the Project site is surrounded by shadow sensitive uses which require an analysis of the Project's shade impacts on these uses. The City should revise the analysis as and EIR which would fully analyze all facets of the Project, its impacts and mitigation and its alternatives.

Sixth, interestingly, Policy K-3 includes a provision that recognizes that the Project may create a potentially significant impact and requires the preparation of an EIR. Policy K-3 at Paragraph D (Environmental Determinations) subparagraph 3 (Initial Studies), states:

"In addition, the following shall be considered in determining whether or not a project may have a significant impact, in view of the particular character and beauty of Newport Beach:

"a. A substantial change in the character of an area by a difference in use, size or configuration is created."

The Project hits all three areas of significance: the Project will result in a substantial and adverse change in the character of the area by the introduction of a new use on the Project site: residential uses; the Project will result in a substantial and adverse change in the character of the area by the introduction of a new and substantially larger residential building; and the Project will result in a substantial and adverse change in the character of the area by the introduction of a new configuration and the elimination of substantial surface public parking in the area. The Project site may have a significant impact on the environment by creating a substantial change in the character of the Project site by a difference in use, size and configuration. Policy K-3 requires the preparation of an EIR.

Now, we know that the City Council can change or ignore these policies at will, but the Planning Commission and staff cannot. Moreover, the standard identified above is not simply a City standard; it is a CEQA standard. Public Resources Code section 21068.5. That is, because of the Project's substantial and adverse change in use, size and configuration, the Project has the potential to create significant and adverse impacts on the environment. This CEQA requirement and that of Policy K-3 requires that the City prepare an EIR for the Project.

Eighth, although the FMND recognizes that the Lido Village Design Guidelines are not regulatory and have not regulatory effect, the FMND still regards them as regulatory and relies on the Guidelines to show that the Project will have no impacts. For instance, Comment No. 15 raises the issue regarding the non-regulatory effect of the Guidelines and quotes Resolution No. 2012-4 which states that they are non regulatory. The Response to Comment No. 15 states in part:

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"The characterization in the Draft IS/MND that the guidelines as regulatory in nature was unintentional. Rather, the discussion of the Lido Village Design Guidelines was (sic) intended to illustrate that future development must be found to be consist (sic) with the design guidelines for approval. Development of the redevelopment/reuse plan in accordance with the guidelines will promote the vision that is described in the Lido Village Design Guidelines through site planning/design and architectural compatibility."

Responses to Public Comments, page 10 (sic) (emphasis supplied). So, Comment No. 15 quoted a section in the DMND which said that the Guidelines are regulatory and that the Project must comply with them. The Response does not correct this error; it recognizes it and says it is unintentional(?).

That is not the point. The FMND and Response to Comment No. 15 continues to regard the Guidelines as regulatory. The second sentence quoted above displays this incorrect application of the Guidelines: if development "must be found to be consist[ent] with the design guidelines for approval," then the FMND incorrectly regards the Guidelines as regulations. That is wrong. Rather, the correct description of the Guidelines and the Project is that the Guidelines are part of the Project and require their own environmental review to stand as regulations. The City should prepare an EIR to analyze the full Project: the Project and the Guidelines.

Or again, Response to Comment No. 16 shows that the FMND regards the Guidelines as regulatory in the same fashion as the General Plan and the Local Coastal Land Use Plan:

"Therefore, consistency with the LVDG, in addition to the long-range goals and policies articulated in the Newport Beach General Plan and Coastal Land Use Plan support, land use compatibility and the conclusion that potential impacts would be less than significant."

The General Plan and the Local Coastal Land Use Plan are regulatory and have undergone their own environmental review. The Guidelines have not. Therefore, consistency with the Guidelines does not ensure any environmental compliance at all.

More importantly, as noted above, the Project does not comply with the General Plan, the Zoning Code, and the Local Coastal Land Use Plan. The Project includes amendments to all three. Therefore, the appropriate environmental analysis must discuss all potentially significant impacts and propose adequate mitigation.

In conclusion, the FMND is totally inadequate. Good and sound policy reasons and good planning require the preparation of an EIR. Such an EIR would analyze all impacts including shade impacts, would include adequate mitigation, would include a discussion of Project alternatives which is necessary for the Project to go forward, and would allow the City to override any significant unmitigated impacts.

Item No. 4b: Additional Materials
Planning Commission January 17, 2013
Existing City Hall Complex Reuse

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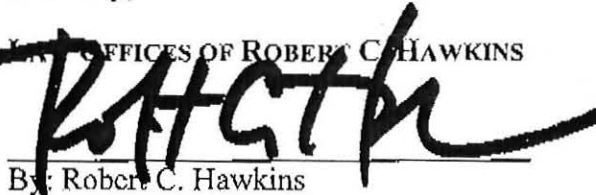
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Thank you, again, for the opportunity to comment on the FMND. As before and although ignored for this hearing, **PLEASE PROVIDE US WITH NOTICE OF ANY RESPONSES TO THESE COMMENTS IN A NON-ITALICIZED FORMAT AND WITH NOTICES OF ANY AND ALL HEARINGS ON THE CAPTIONED PROJECT AND FMND.**

Of course, should you have any questions, please do not hesitate to contact me.

Sincerely,

OFFICES OF ROBERT C. HAWKINS



By: Robert C. Hawkins

RCII/kw

cc: Leilani Brown, City Clerk (Via Facsimile Only)